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IN THE

Supreme Court of the United States

October Term, 1959

No. 189

IN THE MATTER

of

JAMES CITROEN,

Petitioner,

a witness before the Grand Jury of the County of Kings held in and for the March 1958 Term hereof as extended.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, James Citroen, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered on June 9th, 1959, dismissing for lack of jurisdiction an appeal from the Order of Judge Leo F. Rayfiel, a Judge of the United States District Court for the Eastern District of New York, denying a motion made by the petitioner to quash, vacate and set aside a subpoena of the Grand Jury of the County of Kings, New York, requiring the petitioner to appear as a witness.

The petitioner was served with a Grand Jury subpoena in an investigation being conducted by the District Attorney

Kings County, New York, into a practice commonly known as "ambulance chasing" among attorneys and counsellors at law admitted to practice in the County of Kings, and other and illegal and criminal activities of such attorneys and other persons who may be involved with them.

The petitioner is not an attorney or counsellor at law, but is a public adjuster who endeavors to settle accident cases for attorneys with insurance companies.

A motion to quash, vacate and set aside this subpoena was made in the County Court, Kings County, New York, which motion was denied on October 10th, 1958.

A notice of appeal from the said Order of the County Court, Kings County, New York, was then served and filed to the Appellate Division of the Supreme Court, Second Department, which appeal was dismissed on November 24th, 1958 on the ground that the said Order of the County Court, Kings County, New York, was not appealable.

A motion for leave to appeal to the Court of Appeals of the State of New York from the said Order of the Appellate Division of the Supreme Court of the State of New York, Second Department, was then made to Judge Albert Conway, Chief Judge of the Court of Appeals, which was denied on December 19th, 1958 on the ground that the said Order was not appealable.

Having exhausted all remedies in the State Courts, the petitioner then made a motion in the United States District Court, Eastern District of New York, to quash, vacate and set aside the said subpoena which was denied on March 19th, 1959 by Judge Leo F. Rayfiel.

A notice of appeal was then served and filed to the United States Court of Appeals, Second Circuit, from the said Order entered in the United States District Court, Eastern District of New York, which appeal was dismissed for lack of jurisdiction on June 9th, 1959.

Statutes and Rules Involved

Section 2447 of Penal Law of the State of New York:

> "Witnesses immunity.—In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.
>
> 2. 'Immunity' as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in

producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

"Competent authority" as used in this section means:

* * * * *

(c) The grand jury before which a person is called to answer questions or produce evidence, when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence;"

2. Amendment *XIV*, Section I of the Constitution of the United States:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*, nor deny to any person within its jurisdiction the equal protection of the laws."

3. Article I, Section 6, Subdivision 3 of the Constitution of the State of New York:

"No person shall be deprived of life, liberty or property without due process of law".

POINT I

The Grand Jury is unable to give the petitioner full immunity from prosecution for the crime of wilfully evading income taxes.

The petitioner was subpoenaed by the Grand Jury of the County of Kings, pursuant to an investigation being conducted into the practices of attorneys engaged in negligence practice. It would probably have to be conceded by the District Attorney of the County of Kings, that the petitioner, who is a public adjuster of accident cases for attorneys with insurance companies, had been called before the Grand Jury pursuant to a subpoena to testify about his relationship with attorneys, and with those employed in the insurance companies who have the power to adjust negligence cases.

It is contended that Section 2447 of the Penal Law of the State of New York, cannot clothe the petitioner with as broad an immunity as is co-extensive with the perils that the petitioner would face if he testified.

In *Counselman* v. *Hitchcock*, 142 U. S. 547, at page 562, the Court stated as follows:

> "The object was to insure that a person should not be compelled when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but is as broad as the mischief against which it seeks to guard."

At page 564, the Court stated:

> "It remains to consider whether §860 of the Revised Statutes removes the protection of the constitutional privilege of Counselman. That section must be construed as declaring that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence, or in any manner used against him on his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. It follows, that any evidence which might have been obtained from Counselman by means of his examination before the grand jury could not be given in evidence or used against him or his property in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. This, of course, protected him against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted."

At page 585, the Court stated:

> "It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect."

And also at page 586, the Court stated:

> "Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party."

This case was cited with approval and followed in *People ex rel. Lewisohn* v. *O'Brien*, 176 N. Y. 253.

Assuming for the sake of argument that Section 2447 of the Penal Law may give to the petitioner full immunity for or on account of any transaction, matter or thing, concerning which he gave answer or produced evidence and that no such answer given or evidence produced shall be received against him upon any Criminal proceeding, the petitioner, nevertheless, would be placed in a position to supply leads which may result in his own prosecution.

His dealings with lawyers would necessarily entail an examination of the petitioner as to the services rendered and as to the sum of money, if any, each attorney paid to him for such services. The mere interrogation of the petitioner as to the identity of those lawyers with whom the petitioner had done business, could necessarily give to the District Attorney leads as to what the petitioner earned during a current year.

All that the District Attorney would then have to do would be to call upon the Tax Department to produce the tax returns of the petitioner and upon scrutiny, if the District Attorney found that there was any evasion of taxes in the income tax returns filed by the petitioner could subject the petitioner to prosecution.

So it necessarily follows that the petitioner is not clothed with the immunity under Section 2447 of the Penal Law which would be co-extensive and as broad as the peril that the petitioner faces.

While the District Attorney may argue that he is not interested in tax returns of the petitioner, that lack of interest on the part of the District Attorney does not afford to the petitioner a constitutional guaranty against self-incrimination, or does not protect him against furnishing leads which may lead to his own prosecution in violation of Amendment XIV, Section I, of the United States Constitution, and in violation of the due process clause contained in the New York State Constitution, Article I, Section 6, subdivision 3.

To compel this petitioner to appear before the Grand Jury and give testimony, even with the immunity granted to the petitioner under Section 2447 of the Penal Law, would still give to the District Attorney the determination as to whether he should or should not follow through on any lead that the petitioner may give to him by his own testimony.

So it is submitted and urged that the petitioner would be liable to a prosecution for a wilful evasion of state income taxes that is a crime under the laws of the State of New York, in violation of the due process clause in both the Federal and New York State Constitutions, by being compelled to give testimony.

The District Attorney has relied in the lower courts upon the case of *People* v. *DeFeo*, 308 N. Y. 595. But that case is not applicable to the instant situation. In that case the immunity which was conferred upon DeFeo was incomplete.

The Court of Appeals of the State of New York found that the immunity conferred was qualified and restricted and that there was no basis in the law for such qualification and limitation. The Court of Appeals, therefore, did not determine the question as to whether Section 2447 of the Penal Law was as extensive and as broad as the perils that a witness may face when testifying before the Grand Jury. The Court of Appeals having found that the immunity was qualified and restricted by the remedies mentioned by the Foreman of the Grand Jury, the Court of Appeals, therefore, did not determine whether Section 2447 of the Penal Law would provide such immunity to a witness as would be co-extensive and as broad as the peril the witness would face.

In other words, the Court of Appeals of the State of New York did not reach the question as to the legal effect of Section 2447 of the Penal Law of the State of New York.

The fact that the petitioner may be prosecuted for a wilful evasion of his income tax and or give leads by his own testimony to evidence which may result in the prosecution of the petitioner for wilful evasion of the state income tax, is a danger which should be recognized by this Court.

In the case of *Doyle* v. *Hofstadter*, 257 N. Y. 244, Chief Judge Cardozo of the Court of Appeals, stated as follows:

> "The clues thereby developed may still supply the links whereby a chain of guilt can be forged from the testimony of others. To force disclosure from unwilling lips, *the immunity must be so broad that the risk of prosecution is ended altogether.* (People ex rel. Lewisohn v. O'Brien, 176 N. Y. 253; Counselman v. Hitchcock, 142 U. S. 547. Heike v. United States, 227 U. S. 131, 142)." (italics mine), 257 N. Y. 244, 250.

POINT II

The petitioner cannot be granted full immunity from the danger of prosecution for a conspiracy to bribe.

Undoubtedly, the District Attorney, on the examination of the petitioner before the Grand Jury, would be interested in learning how the petitioner was able to settle cases and in what amounts with agents of insurance companies. The evidence that the District Attorney will thereby be interested in would be as to whether the petitioner had ever bribed or given any token or any sum of money to any agent of an insurance company who had the authority to make adjustments in negligence cases. It would then necessarily follow that an inquiry would be conducted as to the relationship of the petitioner with these agents in the various insurance companies. By pursuing that phase of the investigation and by pursuing an examination of the petitioner along those lines, there could be only one purpose that the District Attorney would have and that would be to establish that the petitioner bribed or attempted to bribe or entered into a conspiracy to bribe an adjuster or an agent of an insurance company.

The case of *Doyle* v. *Hofstadter, supra,* is authority for the proposition that immunity from prosecution cannot be granted for a conspiracy to bribe. In others words, the petitioner would not be immune from prosecution for any act or agreement not amounting to the completed crime of bribery, but would in such instance place him in danger of an indictment for conspiracy.

While it may be the position and attitude of the District Attorney that he is not interested at all in the petitioner, yet

the liberty of the petitioner should not depend upon the whim or interest of a prosecuting agency.

POINT III.

The federal courts have jurisdiction to determine whether the petitioner's constitutional rights and privileges are being violated, and therefore, the petitioner's appeal to the Federal Court of Appeals for the Second Circuit should not have been dismissed for lack of jurisdiction.

The majority of the Judges of the Federal Court of Appeals dismissed the appeal taken by the petitioner from the order of Judge Leo F. Rayfiel, a Judge of the District Court of the United States, Eastern District of New York, on the ground of lack of jurisdiction, relying solely and only on the case of *United Public Workers* v. *Mitchell*, 330 U. S. 75, (See per curiam opinion of Judges Swan and Hincks of the Federal Court of Appeals for the Second Circuit, Judge Moore dissenting).

In the case of *United Public Workers of America* (C. I. O.) *et al* v. *Mitchell, et al, supra*, certain employees of the executive branch of the Federal Government sued for an injunction against the members of the Civil Service Commission to prohibit them from enforcing against such employees Section 9 (a) of the Hatch Act, 18 U. S. C. Supp. V Sec. 61(h), which forbids such employees from taking "any active part in political management or in political campaigns", and also for a declaratory judgment of the unconstitutionality of this section. They did not allege that

they had violated the act or that they actually were threatened with any disciplinary action, but only that they desired to engage in acts of political management and in political campaigns (specifying the nature of the actions which they wish to take), and are prevented from doing so by fear of dismissal from federal employment. It was held that their suit does not present a justiciable case or controversy.

The Honorable Court stated at page 88:

> "They declare a desire to act contrary to the rule against political activity, but not that the rule has been violated. In this respect, we think they differ from the type of threat adjudicated in *Railway Mail Association* v. *Corsi*, 326 U. S. 88. In that case the refusal to admit an applicant to membership in a labor union on account of race was involved. Admission had been refused. 326 U. S. at p. 93, note 10."

> "The threats which menaced the affiants of these affidavits in the case now being considered are closer to a general threat by officials to enforce those laws which they are charged to administer, compare *Watson* v. *Buck*, 313 U. S. 387, 400, than they are to the direct threat of punishment against a named organization for a completed act that made the mail association and the *Hill* case justiciable."

Further at pages 89 and 90, this Honorable Court stated:

> "The powers of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress, arises only when the interests of litigants require the use of this judicial authority for their protection. A hypothetical threat is not enough. We can only speculate as to the kinds of political activity

> the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication. It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other."

* * * * *

Still further at pages 90 and 91, this Honorable Court stated:

> "Should the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues they would become the organ of political theories. Such abuse of judicial power would properly meet rebuke and restriction from other branches."

In the instant case, there is no hypothetical threat, but a real threat to the liberty and freedom of the petitioner. Unlike the case of *United Public Workers v. Mitchell, supra*, the petitioner herein has been served with a subpoena of the Grand Jury of the County of Kings, New York. In the case of *United Public Workers v. Mitchell, supra*, the employees sued for an injunction and also for a declaratory judgment. They did not allege that they had violated the Hatch Act, or that they actually were threatened with any disciplinary action. In the instant case, however, the petitioner is faced with a real threat because the Grand Jury is unable to give to petitioner the full immunity which should be coextensive with the perils he faces, because of the Grand Jury subpoena served on him, and the petitioner will be

subjected to deprivation of his liberty without due process of law. The petitioner does not seek an advisory opinion from this Honorable Court because the instant case is directly contrary to the case of *United Public Workers of America* v. *Mitchell, supra.*

It is, therefore, urged that this appeal should not have been dismissed for lack of jurisdiction, but an opinion on the merits should have been rendered by the Judges of the Court of Appeals for the Second Circuit.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY A. LOWENBERG
Attorney for Petitioner

APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 330—October Term, 1958.

(Argued May 11, 1959 Decided June 9, 1959.)

Docket No. 25599

In the Matter

—of—

JAMES CITROEN,

Appellant.

Before:

SWAN, HINCKS and MOORE,

Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, Hon. Leo F. Rayfiel, *Judge*, which denied a motion to quash a subpoena of the Grand Jury of Kings County, New York, requiring appellant to appear as a witness. Reversed and remanded with directions.

Appendix—Opinion of United State Court of Appeals for the Second Circuit

HENRY A. LOWENBERG, *Attorney for Appellant.* Sydney Hyman on the brief.

EDWARD S. SILVER, District Attorney Kings County, *Attorney for Appellee.* Aaron E. Koota and William Sonenshine, Assistant District Attorneys, of Counsel.

PER CURIAM:

Appellant was subpoenaed to appear before the Kings County Grand Jury in connection with its investigation into "ambulance chasing." He attempted unsuccessfully to have the subpoena quashed in the courts of the state. Having exhausted state remedies, he sought by motion to have the subpoena quashed by the District Court for the Eastern District of New York. As we understand Judge Rayfiel's opinion, not yet officially reported, it denied the motion on the merits. For reasons about to be stated we think the motion should have been dismissed for lack of jurisdiction.

Appellant's motion asserts that the Grand Jury cannot grant immunity from prosecution for certain state crimes, and that "To compel this witness, James Citroen, to testify before the Grand Jury that has the power of granting only limited immunity from prosecution, would surely be a violation of Article XIV of the Constitution of the United States . . . ." The motion is premature. No question has yet been put to the witness. When he is questioned, he may or may not claim the privilege against self-incrimination. If he claims it, the Grand Jury may or may not offer him immunity. His motion assumes that he will

claim his privilege and that they will then offer immunity. What his motion asks the court to do is to render an advisory opinion as to the scope of the immunity protection under §2447 N. Y. Penal Law, if immunity is hereafter offered him, and as to the constitutionality of such a grant of immunity. The court lacked jurisdiction to render an advisory opinion. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 89-91.

Order reversed and cause remanded with directions to dismiss for lack of jurisdiction.

MOORE, *Circuit Judge* (dissenting):

I do not agree with dismissal for lack of jurisdiction. It seems clear to me that jurisdiction is being confused with right to relief. The petitioner had the privilege of entering the federal court to claim that his constitutional rights were being violated. This gives the court jurisdiction. The fact that we believe that he was premature or that no federal question was raised or that he was not entitled to have his motion granted does not mean that the court had no jurisdiction to entertain his motion.

Unlike the employees in *United Public Workers* v. Mitchell, 330 U. S. 75 (1947), the petitioner here had been served with a subpoena. In moving to have the subpoena quashed on constitutional grounds he asked the district court for immediate relief from what he asserted was an unconstitutional interference. The employees in *United Public Workers* did not allege that anything had been done to affect them or their property. They asked for an advisory opinion which would protect them in the event that

they might decide to do certain things which they desired to do and which they feared would be violations of an unconstitutional statute. It was to erase their inhibiting fear of dismissal under the statute that they brought their action. Their only "controversy" was an abstract political disagreement with Congress, not founded upon the immediate injury or threat of injury which the courts are empowered to prevent.

I would affirm on the merits.